**SC 83704**

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**IN THE MISSOURI SUPREME COURT**

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**STATE OF MISSOURI, ex rel. ROMA MARTIN-ERB,**

**Relator-Appellant,**
**vs.**

**MISSOURI COMMISSION ON HUMAN RIGHTS and STERLING ADAMS,**

**Respondents,**

**and**

**WAL-MART STORES, INC.,**

**Intervenor-Respondent.**

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# SUBSTITUTE BRIEF OF INTERVENOR-RESPONDENT WAL-MART STORES, INC.

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**Respectfully submitted,**

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## JURISDICTIONAL STATEMENT

Article V, § 10, of the Missouri Constitution permits transfer of a case from the court of appeals "by order of the supreme court." This Court ordered transfer on August 21, 2001. Normally, that would give this Court jurisdiction without question.

In this case, however, the application for transfer was tendered to the court of appeals for filing on the sixteenth day after that court filed its memorandum opinion. Rule 83.02 is plain: "Application by a party for such transfer shall be filed within fifteen days of the date on which the opinion, memorandum decision, written order or order of dismissal is filed."

Case law holds that the time limits in Rule 83.02 and 84.17 (motion for rehearing) are mandatory and the court of appeals is without power to waive them. On at least four occasions, courts have considered the argument that the time for rehearing or transfer can be extended. Each time the Court rejected the argument.

In *Adams v. White*, 488 S.W.2d 289, 294 (Mo. App. 1972) the motion for rehearing or to transfer was filed on the sixteenth day after the opinion was filed. The court held:

> The 15-day limitation for filing defendant's motion [for rehearing or to transfer] 'is cast in mandatory language, and neither counsel nor the court is at liberty to ignore or wink at that limitation. The order of this court should be and is that [defendant's] purported motion for rehearing or to transfer be stricken.'

(citations omitted). *Accord Hood v. M.F.A. Mut. Ins. Co.*, 379 S.W.2d 806, 813 (Mo. App. 1964) (court struck untimely motion for rehearing and to transfer though the court did make *ex gratia* comments that motion would have been overruled); *Hoevelman v. Reorganized Sch. Dist. R2 of Crawford County*, 452 S.W.2d 298, 303 (Mo. App. 1970) (striking motion for rehearing filed on sixteenth day, citing *Hood*); *Ely v. Parsons*, 399 S.W.2d 613, 619 (Mo. App. 1966) (motion for rehearing "may have been mailed" before deadline, but was received by court on seventeenth day; Court noted "mailing does not constitute filing" and ordered motion stricken; Court did make *ex gratia* comments that motion would have been overruled).

Because the application to transfer at the court of appeals was late, the court of appeals lacked jurisdiction to consider it, and this Court lacks jurisdiction now. In the alternative, Wal-Mart respectfully suggests that this Court apply the "plain error" standard of review set out in Rule 84.13. Subsection (c) of that Rule states that plain error affecting substantial rights may be reviewed at the discretion of the Court, "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 84.13(c); *see Great S. Sav. & Loan Ass'n v. Wilburn*, 887 S.W.2d 581, 583 (Mo. banc 1994).

## STATEMENT OF FACTS

Intervenor-Respondent Wal-Mart Stores, Inc. ("Wal-Mart") submits its own Statement of Facts because relevant facts are omitted from the Statement of Facts in Appellant's Brief. *See* Rule 84.04(f). This is done for the convenience of the Court, so that the Court will have all relevant facts in one statement. Since the case was decided on a motion to dismiss, the facts are from the pleadings and exhibits thereto.

Wal-Mart hired Appellant ("Plaintiff") at its Jefferson City, Missouri, store on August 5, 1991. (L.F. 42). She started as an hourly photo lab associate, and was promoted to photo lab manager on August 24, 1991. Wal-Mart terminated Plaintiff's employment on January 11, 1997. (L.F. 42).

On January 21, 1997, Plaintiff filed a charge of discrimination with the Missouri Commission on Human Rights (the "Commission" or "MCHR"). (L.F. 42). By statute, the Plaintiff could have requested "a letter indicating his or her right to bring a civil action" at any time 180 days after she filed the charge of discrimination. § 213.111.1.[1] Again by statute, the Commission "shall" issue such a letter upon request. *Id.* In this case, the Plaintiff could have obtained the right-to-sue letter at any time starting on July 20, 1997, as the circuit court found. (L.F. 42).

On February 4, 2000, the executive director of the Commission issued a Determination which stated in part: "Based on consideration of the evidence, a finding of No Probable Cause has been made." (L.F. 5). The Determination was signed by the

[1] All statutory references are to RSMo, 2000.

executive director, not by the Commission or any of its members. (L.F. 5). The Determination also advised Plaintiff that she could appeal the decision in the appropriate circuit court within thirty days of mailing or delivery of the letter. (L.F. 5).

On March 6, 2000, Plaintiff filed her "Petition For Review and Mandamus Under Section 536.150 R.S.Mo" in the Circuit Court of Cole County, Missouri (L.F. 1), and an *ex parte* Preliminary Order in Mandamus issued that day. (L.F. 6). The Petition listed Wal-Mart Stores, Inc. in its caption as a "Party of Record" with instructions to serve its registered agent in Missouri. (L.F. 1). The Petition sought "a full evidentiary hearing on the merits, as authorized by Section 536.150 R.S.MO, that the Court find that Wal-Mart Stores, Inc. violated Chapter 213 R.S.MO in the manner of terminating Relator, that Relator is entitled to be made whole and offered reinstatement…." (L.F. 3).

Wal-Mart moved to intervene in the action, to protect its interests and to clarify its status as a party.[2] (L.F. 12 – 14). Wal-Mart's Motion to Intervene was granted on May 17, 2000. (L.F. 20). On motions to dismiss filed by Wal-Mart and the Commission, the trial court dismissed Appellant's Petition and quashed the Preliminary Order in Mandamus, on July 14, 2000. (L.F. 41 – 51). The Court of Appeals affirmed by an unpublished memorandum. This Court transferred the case on August 21, 2001.

[2] Once a party has been granted intervention, it is considered a full party for all purposes, including appeal. *See Beard v. Jackson*, 502 S.W.2d 416, 419 (Mo. App. 1973).

## POINTS RELIED ON

**I. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE PETITION BECAUSE THE PETITION IS TIME-BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS IN SECTION 213.111.1 IN THAT THE ALLEGED DISCRIMINATORY ACT OCCURRED ON JANUARY 11, 1997, WHILE THIS ACTION WAS FILED ON MARCH 6, 2000, AND THE PETITION IS, IN REALITY, AN ACTION UNDER SECTION 213.111.1.**

Section 213.111, RSMo

Section 213.085, RSMo

Section 536.150, RSMo

*Berkowski v. St. Louis County Bd. of Election Comm'rs.*, 854 S.W.2d 819 (Mo. App. 1993)

*Bus. Men's Assurance Co. of Am. v. Graham,* 984 S.W.2d 501 (Mo. banc 1999)

*Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15 (Mo. banc 1995)

*Hartman v. Smith & Davis Mfg. Co.,* 904 F. Supp. 983 (E.D. Mo. 1995)

*Hill v. John Chezik Imports,* 797 S.W.2d 528 (Mo. App. 1990)

*Kemp v. Woods,* 251 S.W.2d 684 (Mo. 1952)

*Lough v. Rolla Womens Clinic,* 866 S.W.2d 851 (Mo. banc 1993)

*Memco, Inc. v. Chronister*, 27 S.W.3d 871 (Mo. App. 2000)

*O'Donnell v. Baltimore & O.R. Co.,* 26 S.W.2d 929 (Mo. 1930)

*Strawn v. Mo. State Bd. of Educ.,* 210 F.3d 954 (8th Cir. 2000)

*VanKempen v. McDonnel Douglas Corp.*, 923 F. Supp. 146 (E.D. Mo. 1996)

*Whitmore v. O'Connor Mgmt., Inc.* 156 F.3d 796 (8th Cir 1998)

Rule 84.13(c)

8 CSR 60-2.025(7)(A)

**II. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE PETITION BECAUSE MANDAMUS DOES NOT LIE IN THAT: (A) APPELLANT SEEKS REVIEW OF THE DETERMINATION BY THE EXECUTIVE DIRECTOR THAT NO PROBABLE CAUSE EXISTS FOR CREDITING THE ALLEGATIONS OF THE COMPLAINT, A DISCRETIONARY, NOT MINISTERIAL ACT; (B) APPELLANT SEEKS SUBSTANTIVE RELIEF AGAINST A PRIVATE ACTOR; AND (C) APPELLANT HAD AN ADEQUATE REMEDY AT LAW, NAMELY AN ACTION UNDER SECTION 213.111.**

Chapter 213, RSMo (various sections)

Section 536.150, RSMo

*Hamby v. City of Liberty*, 20 S.W.3d 515 (Mo. banc 2000)

*Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278 (Mo. banc 2000)

*Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. banc 1996)

*Mo. Coalition for the Env't. v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. banc 1997)

*State ex rel. Bd. of Health Ctr. Trs. of Clay County v. County Comm'n. of Clay County*, 896 S.W.2d 627 (Mo. banc 1995)

*State ex rel. J.C. Nichols Co. v. Boley*, 853 S.W.2d 923 (Mo. banc 1993)

*State ex rel. Kennedy v. Cont'l. Boiler Works, Inc.*, 807 S.W.2d 164 (Mo. App. 1991)

*State ex rel. Pope v. Lisle*, 469 S.W.2d 841 (Mo. App. 1971)

*State ex rel. Prewitt v. Clark*, 849 S.W.2d 27 (Mo. banc 1993

*State ex rel. Scott v. Scearce*, 303 S.W.2d 175 (Mo. App. 1957)

**III. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE PETITION BECAUSE EVEN IF THE COURT WERE TO CONSTRUE THE PETITION AS INVOKING SECTIONS 213.085 AND 536.150 (NOT 213.111), THERE IS NO STATUTORY RIGHT TO REVIEW OF THE "NO PROBABLE CAUSE" DETERMINATION UNDER SECTION 213.085 OR 536.150 IN THAT: (A) THE APPELLANT IS NOT "AGGRIEVED," AND THE DECISION DOES NOT "AFFECT HER LEGAL RIGHTS," AND (B) THE DETERMINATION CHALLENGED WAS NOT A DECISION OF THE COMMISSION.**

Chapter 213, RSMo (various sections)

Section 536.150, RSMo

*Hertz Corp. v. State Tax Comm'n.,* 528 S.W.2d 952 (Mo. banc 1975)

*Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. banc 1994)

*Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. 1979)

*Gott v. Dir. of Revenue*, 5 S.W.3d 115 (Mo. banc 1999)

*Greenbriar Hills Country Club v. Dir. of Revenue,* 935 S.W.2d 36 (Mo. banc 1996)

*HCA Health Servs. of Mid-West v. Admin. Hearing Comm'n*, 702 S.W.2d 884 (Mo. App. 1985)

*Hyde Park Hous. v. Dir. of Revenue*, 850 S.W.2d 82 (Mo. banc 1993)

*J.I.S. v. Waldon*, 791 S.W.2d 379 (Mo. banc 1990)

*Klinginsmith v. Mo. Dept. of Consumer Affairs*, 693 S.W.2d 226 (Mo. Appl 1985)

*Pollock v. Wetterau Food Distrib. Group*, 11 S.W.2d 754 (Mo. App. 1999)

*Shelter Mut. Ins. Co. v. Briggs*, 793 S.W.2d 862 (Mo. banc 1990)

Mo. Const., Art. V, § 18

Mo. Const., Art. V, § 22

Black's Law Dictionary 413 (5th ed. 1979)

## ARGUMENT

**I. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE PETITION BECAUSE THE PETITION IS TIME-BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS IN SECTION 213.111.1 IN THAT THE ALLEGED DISCRIMINATORY ACT OCCURRED ON JANUARY 11, 1997, WHILE THIS ACTION WAS FILED ON MARCH 6, 2000, AND THE PETITION IS, IN REALITY, AN ACTION UNDER SECTION 213.111.1.**

### A. Standard of Review

Under normal circumstances, Wal-Mart would agree with the statement of the standard of review set out in Appellant's Substitute Brief at page 9. But as set out in Wal-Mart's Jurisdictional Statement, Plaintiff's failure to file a timely application for transfer raises jurisdictional and standard of review questions. Wal-Mart respectfully suggests that the appropriate standard is plain error for manifest injustice. Rule 84.13(c). In any event, if the judgment of the trial court is sustainable on any grounds, it is not to be reversed. *Lough v. Rolla Womens Clinic*, 866 S.W.2d 851, 852 (Mo. banc 1993).

### B. Statutory Background

The starting point is chapter 213 of the Missouri Revised Statutes, the Missouri Human Rights Act ("MHRA" or "Act"). Generally, the Act bars discrimination in employment, housing and public accommodations. *See* §§ 213.040 (housing), 213.045 (commercial real estate loans), 213.050 (selling or renting real estate), 213.055

(employment), 213.065 (public accommodations). Plaintiff claims that Wal-Mart discriminated against her in employment.

A person claiming to be aggrieved by an unlawful discriminatory practice files a complaint (often called a "charge of discrimination") with the Missouri Commission on Human Rights. § 213.075.1. The Commission's executive director,[3] assisted by staff, is to "promptly investigate the complaint." § 213.075.3. There is no statutory directive as to how the executive director is to conduct the investigation.

After investigation, the executive director of the Commission must make an initial, threshold determination: Is there probable cause to credit the allegations in the complaint? § 213.075.3. It is worth noting now, because it will be discussed in Point III below, that the General Assembly gave the executive director – not the Commission – the sole responsibility to make the probable cause determination.

If the executive director determines that there is probable cause to credit the allegations, the Act commands a multi-step process:

1. Immediate efforts to eliminate the unlawful practice by conference, conciliation and persuasion by the executive director. § 213.075.3.
2. A report by the executive director to the Commission on those efforts. § 213.075.3.

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[3] The position of "executive director" of the Commission is created by statute. § 213.010(9). As set out below, the executive director has specific statutory duties given directly to him or her, and not to the Commission.

3. If those efforts fail and "if in the judgment of the chairperson of the commission circumstances so warrant," a written notice requiring the person charged with discrimination to answer the charges before a panel of the commission or a hearing officer. § 213.075.5.

4. Discovery, then a contested case hearing. § 213.075.7, .9 & .10.

5. Findings of fact and conclusions of law by the Commission. § 213.075.11.

6. If the Commission concludes that the respondent has engaged in an unlawful practice, "an order requiring the respondent to cease and desist from the unlawful discriminatory practice," including in the employment context an award of "payment of back pay; hiring; reinstatement or upgrading." § 213.075.11(1).

7. If the Commission concludes that the respondent has not engaged in the unlawful practice, "an order dismissing the complaint." § 213.075.12.

One important feature of this structure is that a finding of probable cause does not inevitably grant the party alleging discrimination a contested case hearing. As described in paragraph 3 above, the General Assembly gave the Commission chairperson total discretion to issue or not issue a notice of hearing in his or her "judgment" if the "circumstances so warrant." § 213.075.5.

By contrast, the Act is silent on what happens when the executive director determines that there is <u>not</u> probable cause to credit the allegations in the complaint. By rule, the complaint shall be dismissed. 8 CSR 60-2.025(7)(A). This is what happened in this case.

The statutory structure gets more complicated when the different means of getting to court are considered. One avenue of judicial review is clear. If the Commission holds a full contested case hearing, "any person aggrieved" by the resulting Commission order may appeal it. § 213.075.16. Though chapter 213 does not explicitly say so, this appeal would plainly be an appeal of a contested case, as set out in sections 536.100-.140.

There is a second route to circuit court explicitly granted by chapter 213. Section 213.111 permits a person filing a complaint with the Commission to go directly to circuit court in a private right of action for money damages against the employer. The mechanics of a section 213.111 private right of action are as follows:

1. 180 days after the complaint is filed with the Commission, the complaining party may request from the Commission "a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint." § 213.111.1. This is often called a "right-to-sue" letter.[4]

2. The Commission "shall issue" the requested letter. § 213.111.1.

[4] This term is something of a misnomer because case law holds that a right-to-sue letter is not a jurisdictional prerequisite to filing the section 213.111 cause of action. The letter can be obtained and filed with the court after the section 213.111 action is commenced. *Whitmore v. O'Connor Mgmt., Inc.*, 156 F.3d 796, 800 (8th Cir. 1998); *VanKempen v. McDonnell Douglas Corp.*, 923 F. Supp. 146, 149 (E.D. Mo. 1996).

3. The action against the employer may be brought in circuit court. § 213.111.1.

4. The Commission must terminate its proceedings relating to the complaint when it issues the right-to-sue letter. § 213.111.1.

5. Any action brought in court under this section "shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party." § 213.111.1. This two-year statute of limitations is central to this case, as will be discussed in the next subsection.

6. The circuit court may grant relief as it deems appropriate including injunction, actual and punitive damages, and costs and attorneys fees. § 213.111.2.

There is a third reference to judicial review in chapter 213. Section 213.085 provides that "[a]ny person who is aggrieved by a final decision, finding, rule or order of the commission may obtain judicial review by filing a petition in the circuit court." § 213.085.2. The petition must be filed within 30 days after mailing of the notice of the final decision. *Id*. "Judicial review shall be in the manner provided by chapter 536, RSMo, . . . ." § 213.085.3. Plaintiff relies on this statute, along with section 536.150, to seek review of the Commission's decision that there is no probable cause to credit the allegations of the complaining party. As set forth below in Point III, Wal-Mart's position

is that sections 213.085 and 536.150 provide no jurisdiction for review of a "no probable cause" decision.

### C. This Petition, While Facially Invoking Sections 213.085 and 536.150, Is In Reality, An Action Under Section 213.111 Against The Employer

This Court ought to affirm the trial court because this Petition in this case is, in truth, a private action against Wal-Mart under section 213.111. The Plaintiff purports to bring it under sections 213.085 and 536.150, which permit judicial review. There are sharp distinctions between a private right of action under section 213.111 and judicial review under sections 213.085 and 536.150. A careful review of the Petition reveals that this action is much more like a section 213.111 private right of action than a petition for review.

To determine the true cause of action, this Court must consider "the facts pleaded and relief sought." *Kemp v. Woods*, 251 S.W.2d 684, 688 (Mo. 1952).[5]

[5] The role of the prayer in determining the cause of action pled is not entirely settled in Missouri. A recent opinion highlights the inconsistency. *Memco, Inc. v. Chronister*, 27 S.W.3d 871 (Mo. App. 2000). The court first said that the prayer does not define the cause of action: "'The character of a cause of action must . . . be determined from the facts stated in the petition and not by the prayer or the name given the action.'" *Id*. at 875 (citations omitted). In the next sentence, however, the court states: "'It is the facts stated in the petition, along with the relief sought, which under our system of code pleading are to be looked at to determine the cause of action . . . .'" *Id*. (citations omitted).

The facts alleged and the relief sought in Plaintiff's Petition show that it is for all practical purposes a section 213.111 civil action. Plaintiff names Wal-Mart in the caption and gives directions to serve its Registered Agent. (L.F. 1). Plaintiff alleges that she "was at relevant times herein employed by Wal-Mart at a retail store located in Jefferson City, Mo., County of Cole." (L.F. 2) She further asserts that "she had been terminated and treated differently in her termination from Wal-Mart due to her race, i.e. African-American." (L.F. 2) Most telling is Plaintiff's prayer for relief: She "requests that the Circuit Court set this matter for a full evidentiary hearing on the merits . . ., that the Court find Wal-Mart Stores, Inc. violated Chapter 213 RSMO in the manner of terminating

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This court has long acknowledged that where the factual allegations in the petition are ambiguous, the prayer may be considered to determine the intention of the pleader. *O'Donnell v. Baltimore & O.R. Co.*, 26 S.W.2d 929, 935 (Mo. 1930). *Kemp* is consistent with this rule. The Petition in this case contains just over two pages of facts, primarily relating to the procedural history of the case. (L.F. 1-3). It also asserts that the "no probable cause" finding issued by the MCHR is unconstitutional, unlawful, unreasonable, arbitrary and capricious, and constituted an abuse of discretion. (L.F. 3). From the facts, one might conclude that Plaintiff is complaining only of her treatment by the MCHR. Yet, she has named Wal-Mart as a party, and prays for "a full evidentiary hearing on the merits," to be "made whole," and reinstatement. This prayer plainly seeks relief from Wal-Mart. These ambiguities within the Petition bring this case under the rule established in *O'Donnell*, and the Court ought to consider the prayer.

[Plaintiff, and] that [Plaintiff] is entitled to be made whole and offered reinstatement . . . ." (L.F. 3). The prayer to be "made whole" is plainly a prayer for damages. Damages and reinstatement are the type of relief authorized by section 213.111.2.

The Petition purports to invoke section 536.150,[6] and Appellant's Substitute Brief invokes section 213.085. The cause of action under those sections is limited to "judicial review" of agency decisions. Here, the decision from which review is sought is the executive director's determination that no probable cause exists to credit the allegations in the complaint. *See* § 213.075.3; (L.F. 5). The relief that the Circuit Court could grant in such a review is limited to a finding that the "no probable cause" finding was incorrect, as the text of section 536.150 makes clear:

[6] Appellant's Substitute Brief argues that this is a noncontested case, not a contested case. Brief at 11-12. Wal-Mart does not contend and has not contended that the executive director's determination was a contested case or that Appellant should have sought review of it under sections 536.100-.140.

> [I]n any such review proceeding . . . the court may determine whether such decision . . . is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion . . . and may order the administrative officer or body to take such further action as it may be proper to require.

§ 536.150.1.

Plaintiff seeks review of the "no probable cause" determination, so by the plain text of section 536.150 the court's authority is limited to determining whether that "no probable cause" determination is unconstitutional, unlawful, unreasonable, arbitrary or capricious or involves abuse of discretion. If the circuit court were to so find, it would have no authority to find that Wal-Mart violated the statute and then award the relief – damages and reinstatement – that Plaintiff prays for. Rather, it could merely determine that the "no probable cause" determination was incorrect and order the executive director (not Wal-Mart) to issue an order that probable cause exists.[7] Such an order would not warrant back pay and reinstatement. Instead, it would start the conciliation procedures set out at subsection 213.075.3.

[7] Further evidence of the pleading problems in this case is that the Petition fails to name the executive director as a party when it is the executive director who, by statute, made the "no probable cause" finding of which Plaintiff complains. § 213.075.3.

The Petition seeks nothing at all from the executive director and nothing from the Commission except that the Commission be commanded to file an answer. (L.F. 3-4). If the Plaintiff were truly seeking judicial review of the finding of "no probable cause," the proper prayer for relief would be to ask the circuit court to reach the conclusion that the "no probable cause" finding was wrong, then remand the case to the executive director for all the statutory procedures that follow a finding that there is probable cause. But Plaintiff did not ask for a circuit court order that the "no probable cause" determination is wrong under the section 536.150.1 standard of review. She did not ask for an order compelling the executive director to engage in the "conference, conciliation and persuasion," required by section 213.075.3 to be done immediately following a determination of probable cause. She did not ask for an order directing the chairperson of the Commission to issue a notice of hearing. Finally, she did not ask for an order compelling a panel of the Commission to conduct a hearing. Instead, Plaintiff asked the trial court to order Wal-Mart to reinstate her and pay her money. In substance, that is a civil action under section 213.111.1.

Once this Court properly characterizes the Petition as a section 213.111 private cause of action, it has no choice but to follow the plain text of the statute and affirm the circuit court. The General Assembly commands that "[a]ny action brought in court under this section shall be filed . . . no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party." § 213.111.1. There is no dispute that the alleged cause occurred on January 11, 1997, and that this action was filed on March 6, 2000, fourteen months too late. (See Appellant's Substitute Brief at 5).

Statutes of limitation are favored in the law, and exceptions to those statutes of limitations are strictly construed. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19-20 (Mo. banc 1995). The general purpose of statutes of limitation is to prevent the assertion of stale claims. *Bus. Men's Assurance Co. of Am. v. Graham*, 984 S.W.2d 501, 507 (Mo. banc 1999). The General Assembly has determined that an employee cannot base a discrimination claim against an employer on allegations of discrimination which occurred more than two years prior to filing the claim.

The two-year statute in section 213.111.1 has been routinely applied by courts, with no hint that it is unduly short or otherwise unfair. The Eighth Circuit rejected a claim that the two-year period should not be applied as the most analogous state statute to a claim under the federal Individuals with Disabilities Education Act; holding "A two-year statute of limitations does not frustrate federal policy." *Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954, 958 (8th Cir. 2000); *see also Hartman v. Smith & Davis Mfg. Co.*, 904 F. Supp. 983, 986-87 (E.D. Mo. 1995) (statute of limitations in 213.111 action not tolled while case is pending in federal court). Missouri courts have routinely applied the two-year statute of limitations as well. *Hill v. John Chezik Imports*, 797 S.W.2d 528, 530 (Mo. App. 1990) (rejecting tolling argument and applying two-year statute); *Berkowski v. St. Louis County Bd. of Election Comm'rs.*, 854 S.W.2d 819, 827 (Mo. App. 1993) (plaintiff may not name additional defendants to 213.111 action after statute of limitations has run).

Thus, this Court can and should affirm the circuit court on narrow grounds that do nothing more than follow the plain text of section 213.111. This petition in this case is

properly characterized as a section 213.111 private cause of action. So characterized, the plain text of section 213.111.1 dictates that the dismissal of the petition be affirmed.

## II. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE PETITION BECAUSE MANDAMUS DOES NOT LIE IN THAT: (A) APPELLANT SEEKS REVIEW OF THE DETERMINATION BY THE EXECUTIVE DIRECTOR THAT NO PROBABLE CAUSE EXISTS FOR CREDITING THE ALLEGATIONS OF THE COMPLAINT, A DISCRETIONARY, NOT MINISTERIAL ACT; (B) APPELLANT SEEKS SUBSTANTIVE RELIEF AGAINST A PRIVATE ACTOR; AND (C) APPELLANT HAD AN ADEQUATE REMEDY AT LAW, NAMELY AN ACTION UNDER SECTION 213.111.

Even if this Court were to disagree with Wal-Mart's Point I and find that this Petition can fairly be characterized as a petition for judicial review under sections 213.085 and 536.150, there is a second narrow reason that this Court should affirm the circuit court. Plaintiff seeks a writ of mandamus, but mandamus does not lie on this pleading. First, Plaintiff asks the Court to compel performance of a discretionary, not a ministerial, act. Second, Plaintiff seeks substantive relief – damages and reinstatement – from Wal-Mart, which is not available in mandamus. Third, Plaintiff had an adequate remedy at law. Any one of these points bars mandamus.

### A.

Mandamus will not issue to compel performance of a discretionary act. *State ex rel. Bd. of Health Ctr. Trs. of Clay County v. County Comm'n of Clay County*, 896 S.W.2d 627, 631 (Mo. banc 1995). "The principle at the heart of [the writ of mandamus] is that public officers are required to perform ministerial duties without any request or

demand, and the entire public has a right to that performance." *Mo. Coalition for the Env't. v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 131 (Mo. banc 1997) (brackets in original). A "discretionary act" is one requiring "'the exercise of reason . . . in determining how or whether an act should be done.'" *Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278, 284 (Mo. banc 2000) (citing *Jungerman v. City of Raytown*, 925 S.W.2d 202, 205 (Mo. banc 1996)). By contrast, a "ministerial act" is one that the law directs an official to perform on a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case. *Id.* Mandamus lies only to compel the performance of a ministerial act. *State ex rel. Prewitt v. Clark*, 849 S.W.2d 27, 28 (Mo. banc 1993).

Section 213.075.3 states that probable cause shall be found only "if the [executive] director determines after the investigation that probable cause exists for crediting the allegations of the complaint . . . ." The statute does not mandate that the executive director issue a probable cause determination on a given set of facts. By definition, this determination requires the "exercise of reason" to determine "whether an act should be done." *Green*, 13 S.W.3d at 284. Determining whether probable cause exists is clearly a discretionary act, and mandamus does not lie.

**B.**

The second bar to mandamus is that the relief requested – that Plaintiff be "made whole" and reinstated by a private entity, Wal-Mart – is not suitable in a mandamus action. As discussed above, this Petition never seeks any order directing the Commission or its staff to do anything, except file an answer to the Petition. All the substantive relief

sought – damages and reinstatement – is from Wal-Mart, not from any state official. The essence of mandamus is that "public officers" (not private entities) fail to perform mandatory acts. *See Mo. Coalition for the Env't*, 948 S.W.2d at 131. In very limited situations mandamus may lie to compel a ministerial act by a private actor, such as a failure of a corporation to permit a shareholder or director to review books. *See State ex rel. Kennedy v. Cont'l. Boiler Works, Inc.*, 807 S.W.2d 164, 167-68 (Mo. App. 1991). There is no precedent in Missouri authorizing mandamus as a route to obtain money damages and reinstatement to a job from a private employer.

**C.**

As a third bar to the use of mandamus, Plaintiff had an alternative, adequate remedy at law. "Mandamus will not lie where another adequate remedy is available to relator." *State ex rel. J.C. Nichols Co. v. Boley*, 853 S.W.2d 923, 924 (Mo. banc 1993). "If a party has lost his remedy in due course of law through his own negligence he will not be entitled to a mandamus on the ground of inadequacy of the remedy at law**."** *State ex rel. Scott v. Scearce*, 303 S.W.2d 175, 180 (Mo. App. 1957); *State ex rel. Pope v. Lisle*, 469 S.W.2d 841, 842 (Mo. App. 1971). As set out in Point I above, Plaintiff had an appropriate remedy at law: obtain a right-to-sue letter from the Commission and then sue Wal-Mart directly in a civil action under Section 213.111. She lost that remedy "in due course of law" through her own negligence. Thus, mandamus is not available.

This alternative remedy was not remote or contingent. The Plaintiff had total control of getting a right-to-sue letter. All she had to do was request one in writing, and the Commission would have been required to issue it. § 213.111.1.

This conclusion is supported by this Court's decision last term in *Hamby v. City of Liberty*, 20 S.W.3d 515 (Mo. banc 2000). Though *Hamby* was not a mandamus case, the Court did have to decide whether the availability of a chapter 213 remedy, which the plaintiff had failed to invoke, barred a section 536.150 action.

Hamby was fired; she appealed her dismissal to the City Administrator under the city personnel manual. Hamby's appeal was denied, and she never filed a complaint with the Commission under chapter 213. This Court held that Hamby's section 536.150 action was barred by her failure to file a complaint with the Commission.

This Court held that the availability of a chapter 213 remedy was an alternative remedy and barred the plaintiff from invoking section 536.150:

> In sum, sections 213.075 and 213.111 provided Hamby with 'other provisions for judicial inquiry into or review of [the City's] decision.' This remedy, which is the conventional remedy, was readily available to Hamby, but for some reason, she chose not to pursue it. She may not now seek relief under section 536.150. For that reason, her petition fails to state a cause of action.

*Id.* at 518.

**D.**

Plaintiff defends the use of mandamus by asserting that "Review of noncontested cases are a creation of the legislature. Whether they are titled review, injunction or mandamus has no real significance." Appellant's Sub. Brief at 14. This Court has,

correctly, always given some leeway in pleading extraordinary writs, and particularly, in the difference between writs of prohibition and mandamus. But in this case, the relief sought and the party from whom it is sought are simply incompatible with the essence of the writ of mandamus. *See Mo. Coalition for the Env't.,* 948 S.W.2d at 125. Using mandamus to attack an obviously discretionary decision by a state actor, but then seeking substantive relief from a private entity, is beyond the pale. There is no support in Missouri case law for such an expansion of the writ.

Plaintiff also invokes section 536.150, which states that an agency decision is reviewable "by suit for injunction, certiorari, mandamus, prohibition or other appropriate action . . . ." § 536.150.1 RSMo 2000 (emphasis added). Though it is not entirely clear, it appears that Plaintiff's position is that the reference to mandamus in section 536.150 somehow eliminates the common-law requirements for the writ. Plaintiff cites no authority for this contention. The plain text of section 536.150 defeats it. Section 536.150 lists various forms of actions that are permissible, then references "other appropriate action." The term "appropriate" can only mean that the common law or other requirements for the action must be met. If Plaintiff is unable to meet the common law requirements for mandamus, the text of section 536.150 directs her to choose some "other appropriate action" to seek review. Plainly, she could not obtain an injunction under section 536.150 without showing irreparable harm. Equally, she should not be able to obtain a writ of mandamus without proving all the requirements for the writ.

To summarize on this Point II, the Petition attacks a discretionary, not ministerial, act; mandamus does not lie to award the relief sought by the Petition from Wal-Mart; and

Plaintiff had an adequate remedy at law. The ability to invoke that adequate legal remedy was totally within Plaintiff's control because the Commission is required to issue a right-to-sue letter upon written request. § 213.111.1. The fact that Plaintiff lost this remedy by failing to exercise it does not mean that she is without a legal remedy for purposes of determining if mandamus lies, as the *Scearce* and *Pope* cases make clear. Mandamus does not now lie for Plaintiff.

## III. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE PETITION BECAUSE EVEN IF THE COURT WERE TO CONSTRUE THE PETITION AS INVOKING SECTIONS 213.085 AND 536.150 (NOT 213.111) THERE IS NO STATUTORY RIGHT TO REVIEW OF THE "NO PROBABLE CAUSE" DETERMINATION UNDER SECTION 213.085 OR 536.150 IN THAT: (A) THE APPELLANT IS NOT "AGGRIEVED," AND THE DECISION DOES NOT "AFFECT HER LEGAL RIGHTS," AND (B) THE DETERMINATION CHALLENGED WAS NOT A DECISION OF THE COMMISSION.

### A.

Even if the Court were willing to characterize this Petition as one for judicial review under sections 213.085 and 536.150, and even if it were willing to extend the use of mandamus in an unprecedented way, it still should affirm the circuit court. The Court need not reach this broader question, but if it does look at the purported jurisdictional basis for the Petition, it will find that the circuit court did not have jurisdiction to entertain even a proper petition invoking sections 213.085 and 536.150. Those remedies are not available to challenge the executive director's determination that there is no probable cause to credit the allegations in the Petition.

The starting point is the text of sections 213.085.2 and .3:

> 2. Any person who is aggrieved by a final decision, finding, rule or order of the commission may obtain judicial review by filing a petition in the circuit court of the county of proper

> venue within thirty days after the mailing or delivery of the notice of the commission's final decision.
>
> 3. Judicial review shall be in the manner provided by chapter 536, RSMo, as it may be amended or superseded from time to time.

* * *

Section 536.150 permits "judicial review" of an agency decision in noncontested cases if the decision "determin[es] the legal rights, duties or privileges of any person . . . and there is no other provision for judicial inquiry into or review of such decision."

Section 213.085.2 explicitly requires "aggrievement" before a decision is subject to appeal. The test for violation of a "legal right, duty or privilege" under section 536.150 is the same as "aggrievement" under section 213.085. *See Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915, 921 (Mo. App. 1979). This Court has established this test for "aggrievement":

> The general rule is that a party is aggrieved when the judgment operates prejudicially and directly upon his personal or property rights or interests and that such must be immediate and not merely a possible remote consequence.

*Hertz Corp. v. State Tax Comm'n*, 528 S.W.2d 952, 954 (Mo. banc 1975) (citations omitted); *Shelter Mut. Ins. Co. v. Briggs*, 793 S.W.2d 862, 863 (Mo. banc 1990); *J.I.S. v. Waldon*, 791 S.W.2d 379, 381 (Mo. banc 1990). The word "direct," as used in the *Hertz*

opinion, means "[w]ithout any intervening medium, agency or influence; unconditional." Black's Law Dictionary 413 (5th ed. 1979).

The executive director's "probable cause – no probable cause determination" does not "operate directly" on any property right. Under the chapter 213 statutory structure, if the executive director determines that probable cause exists, the case goes to conference conciliation, and persuasion. § 213.075.3. It might – but might not – go to a hearing. The chairperson of the Commission, exercising his or her judgment, may or may not issue a notice of hearing, as the chairperson judges the circumstances to warrant. § 213.075.5. In the normal course of events – that is, a plaintiff who follows the plain text of section 213.111.1 and files an action within two years – the probable cause/no probable cause determination will never affect private rights at all.

Even in this case where the two years has run, the Determination does not operate "directly." The intervening discretionary decision by the chairperson to issue a notice of hearing (or not) makes the Plaintiff's right to recovery subject to an intervening influence. By the Black's definition, that means it is not "direct." The reason that the "no probable cause" finding is of any significance is because the Plaintiff let the two-year statute lapse. That "condition" (to use the Black's Law Dictionary definition) – not the "no probable cause" finding – is what affected the Plaintiff's rights.

**B.**

There is a second bar to invoking sections 213.085 and 536.150 found in the text of the statutes. Section 213.075 requires the executive director to "promptly investigate the complaint" to determine whether probable cause exists. § 213.075.3. That is

precisely what happened here. Plaintiff received a letter titled "Determination," signed by the executive director, dismissing the complaint due to a finding of no probable cause. L.F. 5. The Determination of "no probable cause" sent to Plaintiff bears no indication that it came from the Commission.

If, on the other hand, the executive director finds probable cause, he or she is to engage in "conference, conciliation and persuasion" to eliminate the discriminatory practice. § 213.075.3. He or she then reports the results to the Commission. § 213.075.3 RSMo. If the executive director fails to eliminate the discriminatory practice, a notice of hearing is "issued and served in the name of the commission," and an evidentiary hearing takes place "before a panel of at least three members of the commission sitting as the commission . . . ." § 213.075.5 RSMo. Section 213.085 provides review to "[a]ny person . . . aggrieved by a final decision, finding, rule or order of the commission.

Section 213.085, by its express terms, permits review only of decisions of the Commission, not the executive director. The "no probable cause" determination at issue in this case is plainly a decision of the executive director.

Where statutory language is clear and unambiguous, there is no room for construction. *Hyde Park Hous. v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). Every word contained in a statute is presumed meaningful. *Gott v. Dir. of Revenue*, 5 S.W.3d 155,158 (Mo. banc 1999). "[T]he legislature's use of different terms in different subsections of the same statute is presumed to be intentional and for a particular purpose." *Armco Steel v. City of Kansas City*, 883 S.W.2d 3, 7 (Mo. banc 1994). In chapter 213, the General Assembly gave some duties to the executive director and some

to the Commission. The unambiguous text in section 213.085 provides for review only of the Commission's decisions. Here, Plaintiff received a determination from the executive director.

This choice by the General Assembly to permit appeal of decisions by the Commission but not the executive director was conscious. In the very same statute, it created the Commission and the office of executive director. It gave specific duties to the executive director, and others to the Commission. In section 213.085.2, it permitted appeal only of decisions of the Commission. When chapter 213 is read as a whole, the only logical conclusion is that the General Assembly consciously decided to permit appeals only of Commission decisions.

Equally, the "no probable cause" determination made and issued by the executive director is not subject to review under section 536.150. That section permits review of decisions by "any administrative officer or body existing under the constitution or by statute." § 536.150.1. The term "administrative officer or body" is not expressly defined, but for purposes of chapter 536, "agency" is defined as "any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases." § 536.010.1. Thus, the definition appears to equate "agency," "administrative officer," and "body." To be an "agency," "administrative officer," or "body," the actor must be authorized by law to make rules or adjudicate contested cases. Sections 213.075.5, .14 and .15 give only the Commission – not the executive director – the authority to adjudicate contested cases. Section 213.030.1(6) gives only the Commission – not the executive director – the

authority to make rules. Thus, only the Commission – not the executive director – is an "administrative officer or body" under section 536.150.

To the extent that the Court finds any inconsistency between section 213.085 and section 536.150 on this point, it should accept section 213.085 as showing the General Assembly's specific intent about review of decisions by the executive director. First, section 213.085 was enacted in 1986, after 536.150 was enacted in 1945. When two statutes cover the same subject matter, the later statute controls. *Klinginsmith v. Mo. Dept. of Consumer Affairs*, 693 S.W.2d 226, 230 (Mo. App. 1985). Second, a specific statute controls a general one. *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996). Section 213.085 specifically defines what decisions under the Human Rights Act can be appealed, while section 536.150 covers all agencies. Since the General Assembly specifically and consciously considered in section 213.085.2 whether determinations of the executive director can be appealed, section 536.150 is not applicable at all.

The reading of sections 213.085 and 536.150 advocated here is not an invitation to insulate from review agency decision-making. This reading is entirely dependent on the General Assembly's conscious and express decision to create an executive director and a Commission, each with specified statutory responsibilities. Equally, it is entirely dependent on the General Assembly's conscious and express decision to make just the Commission's decisions appealable.

Thus, this reading does not invite administrative bodies to make decisions that ought to be appealable under section 536.150 or some other statute, then direct

employees to announce or convey them, hoping that a court will rule the decision not appealable because it did not come from the "administrative body." Any decision the Court would issue in this case on this Point III would plainly apply only to the unique statutory structure in chapter 213.

**C.**

Plaintiff argues that the Constitution commands that she receive judicial review. Article V, section 18 reads, in pertinent part:

> All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law . . . .

Mo. Const. art V, § 18. Section 18, by its plain text, applies only to agency decisions that "affect private rights." In the 1945 Constitutional debates, the author of this provision referred to this term as "words of limitation." Debates of the Mo. Const. 1945, vol. 12 at 3492. The test for "affecting private rights" under the Constitution is the same as the test for "aggrievement" discussed above:

> In order to obtain judicial review pursuant to this constitutional provision, [Plaintiff] must establish that the approval of [Respondent's] application 'operates prejudicially and directly upon . . . [Plaintiff's] personal or property rights

> or interests and that such [is] immediate and not merely a possible remote consequence.'

*HCA Health Servs. of Mid-West v. Admin. Hearing Comm'n*, 702 S.W.2d 884, 890 (Mo. App. 1985), quoting *Hertz*, 528 S.W.2d at 954.[8] As discussed above, Plaintiff cannot meet this test.

Equally, there is no constitutional problem with this Court reaching the conclusion that the executive director is not an "administrative officer or body" under Art. V, § 18. The definition of that term in section 536.010 discussed above was adopted in 1945. 1945 Mo. Laws, 1504, §10. That very same year, the constitutional provision was adopted by the constitutional convention and the People. Given the proximity in time, it is reasonable to apply the same definition of "administrative officer of body" to both section 536.150 and Article V, § 18.

There is support in the debates on the 1945 Constitution that "administrative officer" would not apply to the executive director and was not meant to apply to every actor in state government. Mr. Righter, in response to a question about the scope of the term "administrative officer" stated: "It would mean any administrative officer who may be empowered by law to make a quasi-judicial ruling." Debates of the Mo. Const. 1945, vol. 11 at 3435. In this case, the determination of the executive director that "no probable cause" exists is not quasi-judicial. It is a preliminary determination that decides which of

[8] In *HCA*, the constitutional provision was codified at Art. V, § 22, not § 18 as it now is. The relevant text is the same.

the two procedures will apply. It is perhaps most analogous to a prosecutor's decision not to seek an indictment. As such, the Constitution does not demand review of the "no probable cause" determination.[9]

**D.**

Finally, throughout her brief, Plaintiff invokes public policy to support a right to review.

First, at pages 12 to 14 of the Substitute Brief, Plaintiff speculates at length about the intent of the legislature to permit both an administrative and a court remedy. A decision from this Court that a no probable cause determination is not appealable does nothing to weaken the administrative remedy. For one thing, the Plaintiff's argument assumes that a probable cause finding will inevitably lead to a hearing on the merits. But the statute sets two more hurdles after probable cause is found: The conciliation process and the chairperson's decision whether to issue a notice of hearing.

Moreover, no rationale plaintiff would ever choose to seek review of a no probable cause determination by the route this Plaintiff has.

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[9] Appellant also invokes 8 CSR 60-2.025(7)(E), which states that a no probable cause determination can be appealed to circuit court. The Commission by rule cannot give the court jurisdiction that the General Assembly did not grant. At page 11, Appellant cites *Pollock v. Wetterau Food Distrib. Group*, 11 S.W.3d 754 (Mo. App. 1999). While *Pollock* did give great deference to a legislative regulation (*Id*. at 767), it says nothing about a regulation purporting to give a court jurisdiction.

First of all, the standard of review is not in the Plaintiff's favor. The Commission's decision will only be overturned if unconstitutional, unlawful, unreasonable, is arbitrary or capricious, or involves an abuse of discretion. § 536.150. Second, even if successful, all the complainant "wins" is a remand to the Commission, to be re-inserted into the administrative process at the conference, conciliation and persuasion stage.

By contrast, the section 213.111 private right of action is a direct route to relief in the form of compensatory and punitive damages, attorney's fees and reinstatement. The General Assembly knew that every rational plaintiff who receives a "no probable cause determination" and did not miss the statute of limitations would seek relief under section 213.111.

There is no strategic advantage in seeking judicial review of a no probable cause determination, rather than suing under section 213.111. There is no financial advantage in seeking review of a no probable cause determination. There is no logical reason to provide for such a review at that intersection in the roadway through the complaint process. The Plaintiff in this case asks the Court to stretch the statutes to give a remedy that the legislature never intended. There is no reason for this Court to ignore the established rules to create a right to review that the General Assembly never intended. The stretch that Plaintiff seeks is unnecessary except for the one or two who miss the two-year deadline in section 213.111. Everyone else will get their day, either in circuit court or the Commission.

## CONCLUSION

Wal-Mart respectfully asks that this Court affirm the Judgment of the circuit court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of the foregoing document, along with a disk containing the text of the brief, were forwarded via hand delivery this 15th day of October, 2001, to:

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with Rule 55.03.
2. This brief contains 9,031 words according to the word count feature of Microsoft Word with which it was prepared.
3. This brief complies with Rule 84.06(b).
4. The disks accompanying this brief have been scanned for viruses and to the best of his knowledge are virus free.